Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1267

DAVID GARCIA,
Petitioner,

vs.

JULIANNE KUEHN, a/k/a JULIANNE IRENE KELLER,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING WRIT OF CERTIORARI

The sole basis for Petitioner's request for review is that the Eighth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. (*See* Petition at p. 3).

However, the facts of this case, as set forth in the Court of Appeal's decision (A.1 through A.11) clearly indicate that Petitioner's request for review is without merit. Although the Court of Appeals did affirm the judgment of the trial court, it did so only after a careful review of the applicable North Dakota law and the record available to the trial court at the time summary judgment was granted on the issues of liability and proximate causation. The Court of Appeals refused to sanction the trial court's "offensive use of collateral estoppel" in a diversity case applying North Dakota law. (A.8). Rather, it looked to the record available to the trial court and concluded that the stipulated facts, viewed in the light most favorable to Garcia, presented no genuine issue of material fact regarding his negligence in representing Kuehn. (A.10-A.11)

While it is conceded that the "Order on Pre-trial Conference" was not adopted by the trial judge, this document was signed by counsel for both parties and was placed:

> "... in the record as a statement by counsel of their agreement on certain matters, most of which are not in issue in this case." (Trial Transcript, Vol. I at p. 5, lines 13-15).

As such, it was well within the accepted and usual course of judicial proceedings for the Court of Appeals to consider these stipulated facts, in the light most favorable to Garcia, and to then conclude that he was negligent as a matter of law. It has been stated:

> "The appellate court does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law and ignore any erroneous basis that the district court may have employed." *Wright & Miller, Federal Practice and Procedure,* Civil § 2716 at p. 440.

Any possibility of "misapprehension of facts" by the Court of Appeals was eliminated when Garcia's Petition for Rehearing was denied and the $20,000.00 judgment was affirmed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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